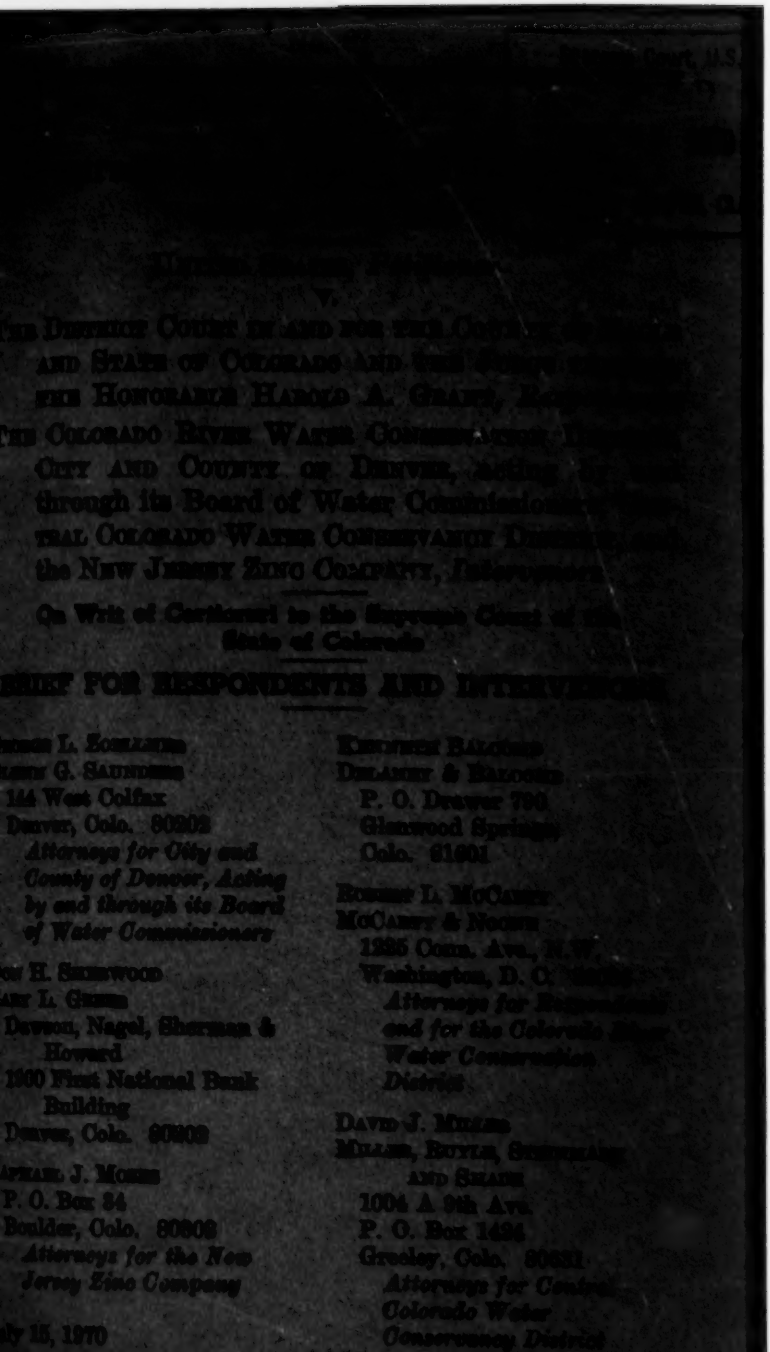

V.

THE DISTRICT COURT IN AND FOR THE CITY
AND STATE OF COLORADO AND
THE HONORABLE HAROLD A. GRANT,
THE COLORADO RIVER WATER CONSERVATION
CITY AND COUNTY OF DENVER,
through its Board of Water Commissioners
TRAL COLORADO WATER CONSERVANCY
the NEW JERSEY ZINC COMPANY,

On Writ of Certiorari to the Supreme Court of the
State of Colorado

BRIEF FOR RESPONDENTS AND INTERVENORS

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July 15, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 87

UNITED STATES, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE HAROLD A. GRANT, *Respondents*

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, and the NEW JERSEY ZINC COMPANY, *Intervenors*

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR RESPONDENTS AND INTERVENORS

STATUTE INVOLVED

In the Government's Brief (at 2) part of 43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) is set forth as follows:

> Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the adminis-

> tration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

We think 666(b) and (c) also pertinent as follows:

> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.
>
> (c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

QUESTIONS PRESENTED

(1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.

(2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

In October 1967, upon the petition of the Colorado River Water Conservation District [1], the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights (A. 3-4) covering the Eagle River and its tributaries,[2] an intrastate river system [3] tributary to the Colorado River. The notice, in addition to advising of certain claims to the use of water by the District, designated December 22, 1967 for the beginning of the taking of evidence in the adjudication and notified all "owners and claimants . . . to file a statement of claim and to appear . . . in regard to all water rights owned

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[1] The Colorado River Water Conservation District is a public agency of Colorado and is comprised of all of 12 and part of 3 other counties in western Colorado. It was established in 1937 by the State Legislature (Colo. Rev. Stat. § 150-7-1 (1963)) for the purpose of conserving and developing the waters of the Colorado River and its tributaries within Colorado.

[2] When this proceeding was instituted the Eagle River system was totally contained in what was then known as Water District No. 37. The 70 then existing Water Districts have since been replaced by 7 Divisions under the Water Rights Determination and Administration Act of 1969, codified as Colo. Rev. Stat. 148-21-1, et seq., as amended (1963). With the exception of the Gunnison River, the Colorado River and its tributaries within Colorado, including the Eagle River system, are now in Division 5.

[3] The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.

or claimed by them." (A. 3) This notice was served on the United States pursuant to 43 U.S.C. 666(b)[4].

Although the United States moved that it be dismissed ". . . for lack of jurisdiction . . ." (A. 5), it nevertheless noted in a supporting memorandum that it would claim rights to some 228 specific uses of water, some of which had been filed as early as 1939 with the State Engineer pursuant to State law, as well as to rights related principally to the withdrawal and reservation of lands for the White River National Forest (A. 6-7). In a later supplement to this memorandum, the United States raised its claimed uses under the national forest reservation from 228 to 375 and also claimed a considerable variety of other specific uses on lands within the Eagle River drainage (A. 8-9).

When the respondent court denied the motion to dismiss and calendared the case, instead of actually filing the claims its memorandum referred to so that they could be known and evaluated, the Government applied to the Supreme Court of Colorado for a writ of prohibition (A. 10-15), at the same time advising that court (A. 14):

> It should be pointed out, of course, that *if this Court* were to find that this Application and its supporting brief misstate Colorado law and *were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed.* (emphasis added)

---

[4] The requirements of Fed. R. Civ. P. 4(d)(4) were also observed.

The Supreme Court of Colorado issued a rule to show cause to the court below (A. 16), answer was made (A. 17-18), and the Colorado Supreme Court reviewed the case on briefs and oral argument.[5] This resulted in an order discharging the rule (A. 45), under an opinion which held that 43 U.S.C. 666 gave jurisdiction to the respondent district court to consider all of the claims of the Government from whatever source derived (A. 41) and that that court, in so doing, could bring before it whatever parties might be necessary to an adjudication of the Government's claims (A. 42-43). The court below further held that questions concerning reserved rights, their amounts and their priorities should await the actual presentation by the United States of its specific claims, following which a final decision could be made (A. 37).

Notwithstanding the fact that the Colorado Supreme Court opinion seemed to satisfy the above-quoted concerns advanced by the Government in seeking prohibition, the United States nonetheless sought certiorari on the scope of jurisdiction conferred on State courts by 43 U.S.C. 666. The petition for the writ admitted that the decision below did not terminate the entire litigation but urged that the question of whether the respondent court had jurisdiction under Section 666

[5] The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim.

to adjudicate the water rights of the United States, including its reserved rights, was separable from the merits and that thus the question of jurisdiction should be considered by this Court now (Petition 7-9). Since the application for certiorari made it clear that the jurisdictional issue would persist, counsel for the respondent court urged this Court to grant the writ and affirm the ruling on jurisdiction in both courts below, to the end that no further time be lost in this highly critical area of the adjudication and administration of rights to the use of water. By order issued on March 30, 1970 this Court granted the writ, and placed the case on the summary calendar (No. 1178, Oct. Term, 1969).

SUMMARY OF ARGUMENT

I

Under its plain meaning, 43 U.S.C. 666 consents to the joinder of the United States in the respondent district court for the adjudication of all the rights to the use of water it may own or claim together with the claims of others, including any rights which may be claimed as a consequence of the establishment of a reservation, in this instance the White River National Forest. Certainly the statute requires the presence of the United States for the rights it indicates it will claim under State law, yet the United States moved for dismissal as to it for all purposes, for lack of jurisdiction. Just as this was manifestly wrong, so is the effort to escape jurisdiction for any other rights it may claim. The position of the United States amounts to an assertion that Congress sheltered it in this regard but the legislative history is overwhelmingly to the contrary. As we show, Congress considered this matter

over the period 1949-1952. After listening over these 3 years to Federal objections to State court jurisdiction Congress rejected them out of hand for the immensely practical reason that the States had long established and highly regarded systems for providing certainty in the conservation and use of water.

II

The issue on which the Government sought certiorari in this Court was whether the respondent court had jurisdiction to entertain the Government's claims. The respondent court supported that effort in order to put the jurisdictional issue to rest and this Court accepted the case on that basis. Now the Government in effect seeks a declaratory order "reaffirm[ing] the principle that the United States has reserved water rights" while at the same time asking this Court to dismiss it from any adjudication. The reason to reaffirm reserved rights, we are told, is that the court below made statements "casting doubt on their existence [thus underlining] our concern that State courts and State law together would . . . eliminate such rights." *If* the court below does in fact do that, then is the time for informed review of the question. But the court below has not done so and thus the question is not here. Even if it were, the many unresolved questions concerning reservations and whatever water rights may attach thereto make it clear that this Court should await a factual determination below before proceeding further, assuming any further action at that time is necessary. This Court has not heretofore made a blanket reaffirmance of the reservation principle and should not now. It has only been enunciated in the past when the facts before the Court justified its implication.

III

As noted, in seeking prohibition the United States told the Supreme Court of Colorado that if it:

> "were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed." (A. 14)

Assuming these conditions, the only reason the United States gave to deny joinder under Section 666 was "for the reason that an entire river system would not be involved." In supporting certiorari we pointed out the obvious—the statute does not say "entire river system". It says "river system or other source". The United States now modifies its views as to river system and says the cases are not "necessarily dispositive" of the situation here. But, the Government further says, even if an entire river system is involved, and even though the Colorado Supreme Court has ruled that the respondent court can bring in all parties necessary to an adjudication of the Government's claims, jurisdiction over the United States is still lacking as whomever should have been were not parties at the time of the attempted joinder of the United States. The Supreme Court of Colorado had no difficulty at all in finding the proceedings to be a general adjudication under Colorado law to which all necessary parties could be joined once the United States actually filed its claims. In the face of these rulings we think the most recent argument of the United States is strained indeed. If it will actually put all of its claims before the court as Congress intended in enacting Section 666, the court can resolve any question of additional parties. Before the Govern-

ment claims are submitted to it the court can do nothing about service upon others possibly affected by such claims. Furthermore, the Government's view of a "general" adjudication can obviously never be reached as long as the Government itself, as an admitted claimant, will not permit itself to be joined.

ARGUMENT

Introduction

The arid west of a hundred years ago, with its limited and highly seasonal water supply and lack of substantial ground water, created an imperative necessity for a suitable system of law to define rights in the waters of its streams if the land was to be made habitable and people led to invest their lives and property in its development.

Colorado early set the pattern by judicial decision,[6] which recognized a new system created by settlers even before statehood referred to as the law of prior appropriation. Thereunder, whomever applies the water of a stream to beneficial use may continue such use in times of water shortage to the exclusion of later appropriators. The right of the first user to relate back to the beginning date of his usage protects such an appropriator in making the investment necessary to make the water useful and the semi-desert habitable.[7]

A salutary characteristic of the right to the use of water under the law of appropriation is that unless

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[6] *Coffin* v. *Left-Hand Ditch Co.*, 6 Colo. 443 (1882).

[7] The origins and workings of the law of prior appropriation as developed and administered in the 11 western states is set out briefly and very cogently at p. 142 of *One Third of the Nation's Land*, A Report to the President and the Congress by the Public Land Law Review Commission, June, 1970.

required, water may not be diverted, but must be left for others who have a need. While a water right may not be created for a speculative purpose, nevertheless an appropriation may be made for a foreseeable future use.[8] Contrary to the Government's assertion (Brief 9), the appropriation system was predicated on the need to conserve as well as to utilize water. The system does not promote inflexible rigidity, as the Government implies, but seeks to accommodate all requirements when they are brought into the established State procedures so they can be identified. The Government, by insisting that reserved rights may not be brought into such proceedings, has generated "uncertainty [which is] an impediment to sound coordinated planning for future water resources development."[9] To the end that there could be certainty in both Federal and non-Federal uses of mainstream Colorado River water, this Court, in settling the decree in *Arizona* v. *California*, 376 U.S. 340, 343-346 (1964) established water rights of fixed magnitude and priority for certain Federal establishments. The possibility of an open-end decree for such reservations was specifically rejected by the Special Master because ". . . such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable [and] . . . it would not give the United States any certainty as to the extent of its reserved rights. . ." (Master's Report 264).

The orderly cataloging of the various rights in relationship to each other has been perfected in all of the western States, and adjudication and administration

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[8] *Denver* v. *Sheriff*, 105 Colo. 193, 96 P. 2d 836 (1939).

[9] PLLRC Report, *supra*, n.7, at 144.

of water for beneficial use is a highly organized and constantly operating function of State government. The efficacy of such systems is jeopardized unless the United States is joined where its presence is necessary and is required with all others to set forth its claims.

Recognizing this, Congress in 1952 enacted 43 U.S.C. 666, referred to as the McCarran Amendment, not to impair the Government's rights in water but to serve as a means by which all rights to the use of water could be made secure through requiring the United States to define its claims and have them adjudicated for all to know. Congress did not choose to establish a separate Federal system to accomplish this purpose, but directed that it be accomplished through the well-known, workable pattern for adjudicating and administering the limited water supply among various users, already long established by the States.

I. IN PASSING 43 U.S.C. 666, CONGRESS CLEARLY INTENDED TO SUBJECT ALL WATER RIGHTS OF THE UNITED STATES TO STATE PROCEEDINGS FOR ADJUDICATION OF WATER RIGHTS.

In view of what Congress was attempting to accomplish by the McCarran Amendment (43 U.S.C. 666), we feel the language used is clear and unmistakable. The legislative history is such that resort to rigid rules of construction is not necessary.[10] While the United States agrees that Section 666 does waive immunity under certain circumstances with regard to rights obtained under State law, it contends that such waiver does not extend to reserved rights. To substantiate

[10] The United States' attempted reliance on the doctrine of *ejusdem generis* is misplaced. That rule may not be used to defeat the obvious purpose of legislation. *Gooch* v. *United States*, 297 U.S. 124 (1936).

such conclusion they resort to a limited examination of the legislative history. Our review of the legislative history shows that three different committees of the House and Senate considered the matter over the period 1949-1952. We believe that the following examination of that legislative history establishes conclusively that Congress intended to permit the joinder of the United States in State proceedings for the consideration of any claim to water the Government might have.[11]

A. S. 2305. To authorize suits against the United States to adjudicate and administer water rights, 81st Cong., 1st Sess. (July 21, 1949).[12]

This bill, quite obviously the genesis of Sec. 666, was introduced by Senator McCarran on July 21, 1949 and referred to the Senate Committee on the Judiciary. It provided very simply as follows:

> That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: Provided,

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[11] As was found by this Court in *Canadian Aviator Ltd.* v. *U.S.*, 324 U.S. 215 (1945) in construing the waiver of immunity under the Public Vessels Act, we think the Congressional action here in adopting broad statutory language authorizing suit was deliberate ". . . and is not to be thwarted by an unduly restrictive interpretation." (at 222). See also *U.S.* v. *Yellow Cab Co.*, 340 U.S. 543, 550 (1951).

[12] The bill is reproduced as Exhibit 1 hereto, at 1e. For its introduction in Congress see 95 Cong. Rec. 9918 (1949).

> That the United States shall have the right of removal to the Federal court of any such suit in which it is a party: Provided further, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Peyton Ford, Assistant to the Attorney General, reported under date of February 27, 1950, that the Department of Justice was unable to recommend enactment of the bill. Mr. Ford's report described the bill in part as follows:

> This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit.[13]

The reasons given for not recommending enactment were as follows:

> The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the *piecemeal adjudication* of water rights, in turn resulting in a *multiplicity of actions* and the joinder of the United States in many actions, in all of which it would be required to claim *every right which it could conceivably have or need,* or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is moreover,

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[13] This report is included in the Committee files on S. 2305 in the National Archives, Water Rights Legislation, 81st Cong., Record Group No. 48, File 8-14.

no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights. (emphasis added)

It is at once apparent from the foregoing that the Department of Justice construed the language of S. 2305, which was almost identical with the language finally enacted as Sec. 666, as requiring the Government when joined to put forth every conceivable claim of right by the United States. The report is notable for its omission of any reference whatsoever to being limited to rights obtained under state law, or to the unsuitability of the appropriation doctrine, both of which are now claimed by the Government to militate against the applicability of 43 U.S.C. 666 in this case.

S. 2305 did not go to hearings, however, and the bill died with the adjournment of the 81st Congress.

B. S. 18. To authorize suits against the United States to adjudicate and administer water rights, 82d Cong., 1st Sess. (Jan. 8, 1951).[14]

On the opening day of the 82d Congress, Senator McCarran introduced S. 18, a bill identical with S. 2305 of the 81st Congress. Hearings were held on April 25, August 3 and August 8, 1951.[15] The representative of the Attorney General made it clear throughout his testimony that the bill was viewed as embracing *all* manner of claims to water rights on behalf of the United States, including claims for reclamation, In-

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[14] This bill is reproduced as Exhibit 2 hereto, at 3e. For its introduction in Congress see 97 Cong. Rec. 86 (1951).

[15] See Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951).

dian, Defense, forest and soil conservation purposes.[16] It was urged that since individuals always had an opportunity to settle such problems by direct recourse to the Department of Justice, such recourse, or a waiver by Congress in individual instances, was to be preferred to the general waiver of immunity that the bill proposed. The general waiver, it was said, would not only lead to a multiplicity of suits, but was so broad that it would permit the institution of water rights suits between States to which the United States would be a necessary party, an issue which was extremely sensitive at the time.[17] Also, as a "first point" against the bill as drafted, the spokesman for Justice referred to the provision for removal to a Federal Court and observed:

> . . . But if this legislation as now written is enacted, you will have two procedures in existence in the State, and it would be a serious detriment to the small water user here if he were to sue the United States and we were to remove over here to the city and county of Denver and he would have to come across the mountain to protect his rights. I don't think that is desirable at all. . . .[18]

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[16] *Id.* at 6, 7.

[17] *Id.* at 5, 6. This Court in *Arizona* v. *California*, 298 U.S. 558 (1936), dismissed Arizona's suit because the United States, a necessary party, had not consented to suit. As the hearings on S. 18 show, proposed legislation was pending at that time to authorize such a suit and also to authorize the Central Arizona Project utilizing water of the Colorado River. California was contending that no project should be authorized until a suit had determined whether Arizona was entitled to sufficient water for the project. Arizona preferred to have the project authorized first. The dispute led to this Court's decision in 1963 in *Arizona* v. *California*, 373 U.S. 546.

[18] Hearings on S. 18, *supra*, at 5.

Other testimony similarly suggested that the removal provision be eliminated and that a provision be added making it clear that nothing in the proposal was to be construed as authorizing the joinder of the United States in original suits.[19] Both suggestions were ultimately adopted.

The volume of the Hearings includes a copy of a report from Deputy Attorney General Ford to the Committee, dated August 3, 1951,[20] which is virtually identical to his report in opposition to S. 2305 of the 81st Congress. The Interior Department reported on the same date,[21] similarly in opposition to the bill but with the interesting observation, which the Department thought warranted consideration, that waiver of immunity appeared appropriate under certain circumstances, including those adjudications limited:

> . . . to . . . those rights of the United States which depend solely upon having been acquired pursuant to State law . . . [but] not . . . to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years) . . .

The views of the Department of the Interior thus went into considerable detail as to the fashion in which Congress could reshape the bill to make it acceptable. The Department did this after setting out a variety of situa-

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[19] *Id.* at 30-32, 47, 54.

[20] *Id.* 66-67. See also S. Rep. No. 755, 82d Cong., 1st Sess. 7 (1951).

[21] *Id.* 67. See also S. Rep. No. 755, 82d Cong., 1st Sess. 7-8 (1951).

ons in which it was in effect the "owner" [22] of water ghts, including many of those purposes mentioned the Justice Department testimony.

It was accordingly clear beyond question that the nguage of the bill upon which these Departments ere reporting, and upon which testimony was given, as considered by them and by the Committee to waive e immunity of the United States to joinder for the rpose of adjudicating *all* of its claims, from what- er source, or in whatever capacity those claims may ve been derived. The Committee proceeded to re- rt the bill to the Senate (S. Rep. No. 755, 82d Cong., t Sess. (1951)). This report recommended passage thout reshaping the bill to adopt the views of Interior d made it clear in the following comment that the jections of Interior and Justice were being totally re- cted:

> The committee has taken note of the reports of the Department of Justice and Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the Committee, that the legislation is meritorious.[23]

The Committee report proposed an amendment which leted the removal provision and denied any construc- n constituting a waiver in original suits between ates. In addition, S. 18 as reported made clear the mmittee's intent that the Government could not aim by reason of its sovereignty the inapplicability

[22] The word is the Department's. See Hearings on S. 18 at 67 d the extract from the report set forth in the opinion of the lorado Supreme Court (A. 42). Note the significant, specific erence by Interior to rights for reservations.

[23] S. Rep. No. 755, 82d Cong. 1st Sess. 2 (1951).

of State laws in any proceeding to adjudicate or administer water rights.[24]

The Committee report also contained a significant exchange of correspondence between Senators McCarran and Magnuson in which Senator Magnuson sought some clarification as to whether Section 1 could be used to block the proposed Hells Canyon project in the Columbia Basin, or any similar multiple-purpose project. He also submitted suggested language for the establishment of a "catalog of water rights, to which the several agencies lay claim".[25] With regard to the question on Section 1, Senator McCarran responded:

> S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.[26]

Having thus reenunciated the central purpose of bringing in the United States in order to have a complete adjudication,[27] Senator McCarran went on to

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[24] A copy of S. 18 as reported is reproduced as Exhibit 3 hereto at 5e.

[25] S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951).

[26] *Id.*

[27] The Government inaptly cites (Brief 25) this same paragraph of Senator McCarran's letter. He was here referring to the necessity of joining the United States as a party, heretofore immune to joinder, as related to the problem of certainty in water right adjudications.

agree enthusiastically with a catalog of claims of the several agencies and that proposal appeared as Section 2 of S. 18 as reported.[28]

Despite this history, the Government contends that all the bill purported to do was to require the United States to appear in connection with water rights of the Government acquired pursuant to State law (Brief 12), quoting portions of S. Rep. No. 755 and of a discussion on the Senate floor on October 11, 1951. These extracts, however, only serve to point up the Committee's recognition that even in connection with rights already adjudicated and held by the Government under State law, the orderly administration of those rights could be frustrated by a non-consenting sovereign. Congress was not only seeking to correct this situation, but to provide for the utilization of the well established State systems for adjudication and administration of the rights of all water users, whether owners or claimants. Thus Senator McCarran explained to the Senate on October 11, 1951 (97 Cong. Rec. 12948):

> . . . Under the laws of many States, in order that an adjudication of the water rights of a stream may be had, it is necessary to join all the parties *owning or claiming* to own any rights to the stream. If one or the other of the owners of the rights cannot be joined, the effect of the decree is obvious. Since the United States has not waived its immunity in cases of this nature, suits for the adjudication of water rights necessarily come to a standstill and confusion results.
>
> The necessity that all *owners or claimants* of water rights on a given stream be joined in a suit for the adjudication of water rights is conceded. (emphasis added).

[28] See Exhibit 3 hereto at 6e-7e.

In addition, the *full* statement of the "purpose of the proposed legislation" (completing the extract set forth at U.S. Brief 14) which Senator McCarran gave to the Senate is important to the proper construction of the statute. That statement was as follows (97 Cong. Rec. 12947 (1951)):

> Mr. President, the purpose of the proposed legislation is to permit the United States of America to be joined as a defendant in any suit for the adjudication of rights to the use of water from any water source, or for the administration of such rights, *where it appears that the United States is the owner,* or is in the process of acquiring ownership of rights by appropriation under State law, and where there is a showing that the United States is a necessary party to such adjudication. *Section 2 of the bill provides for the development of a catalog of water rights owned* by the United States to be kept by the Secretary of the Interior for the purpose of reference thereto as the need may arise. The bill specifically excepts the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. (emphasis added).

The "rights owned" by the United States, as Senator McCarran described them, to be cataloged in Section 2, clearly are of the same nature as the rights of which the United States is the "owner" in Section 1.

In additional explanation of Section 2, Senator McCarran advised the Senate (97 Cong. Rec. 12948 (1951)):

> It also establishes a place where the United States Government itself may go on short notice to de-

termine *any or all* of its holdings.[29] (emphasis added)

Thus, the phrase "or is in the process of acquiring water rights by appropriation under State law" does not limit the term "owner" but rather expands it.

Indeed, the logical construction of the statute, and its plain meaning, is that the United States was to be made a party not only where it claimed to be the owner of rights to use water but also where it was in the process of acquiring such rights, as, for example, had been its custom pursuant to Section 8 of the Reclamation Law.[30]

Senator McCarran's statement paraphrases the language of the proposed bill. As finally adopted, the statute reflects the clear purpose of Congress to utilize State processes for the adjudication of *all* rights of the United States, whether through ownership derived from any asserted Federal authority or as a claimant of rights derived under State law. Senator McCarran's words emphasized the coverage of adjudications under the laws of many States, of rights of "all the parties *owning* or *claiming to own* any rights to the stream." (97 Cong. Rec. 12948, emphasis added). If Congress had intended to limit "owner" (the Government's contention requires this), it would have then specified the limitation. Instead, Congress followed the pattern

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[29] A reading of Section 2 (see Exhibit 3 hereto) makes it clear beyond question that the catalog was to include every conceivable right to water on behalf of the United States, even to military purposes and hydroelectric power production.

[30] Act of June 17, 1902, as amended, 43 U.S.C. 383, 32 Stat. 390. See *U.S.* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 759-761 (1950).

used by many of the States in referring to owners and claimants separately while handling their rights and claims in one proceeding.

In April 1952, the Senate Judiciary Committee issued a second report on S. 18 (S. Rep. No. 755, Part 2), which explained the addition of the numbers in Section 1 of the bill [31] and said with regard thereto:

> . . . this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable. (S. Rep. No. 755, Part 2, 2).

S. 18 as thus amended passed the Senate on June 21, 1952 (98 Cong. Rec. 7817-18).

At the same time that S.18 was pending in the Senate, bills of similar import were pending in the House.[32] Reporting on one of such bills under date of June 27, 1952, the Bureau of the Budget observed: [33]

> Section 3 of the subject bill apparently grants consent for suits against the United States involving the acquisition, determination, or exercise of rights to the diversion and use of water to be brought in State courts and prohibits removal of such suits to a Federal court upon petition of the United States. *The Secretary of the Interior and the Attorney General recommended against the enactment of similar provisions in a bill, S.18, recently passed by the Senate. As pointed out by*

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[31] The full amendment appears as Exhibit 4 hereto, at 9e.

[32] See *e.g.* H.R. 5735 and H.R. 7691 of the 82d Congress, reproduced as Exhibits 5 and 6 hereto, at 11e and 13e.

[33] On H.R. 7691. National Archives, Water Rights Legislation, 82d Cong., Record Group No. 48, File 8-14.

*these agencies, enact*ment of such a law would re*sult in a multiplicit*y of actions and the joinder *of the United State*s in many actions wherein it *would be required t*o claim every right it could *conceivably have or* need, or be subjected to the *possible loss of valu*able rights on the theory of *having split its cause of action.* Such a situation would impose heavy financial burdens not only on the Federal Gover[n]ment but also upon State judicial systems and even private individuals who could be forced to pa[r]ticipate in this type of litigation in order to pro[t]ect their own rights. (emphasis added).

The significance of the foregoing is at once apparent. This was a comment not by one agency or department but from the Executive Office of the President, relating not only to H.R. 7691 then pending before a House Committee, but to S.18 which had only recently passed the Senate and was then pending in the House for action (98 Cong. Rec. 7882 (1952)).[34] The insistence in these comments that S.18 would require the United States to "claim every [water] right it could conceivably have or need" is totally inconsistent with the present argument that consent was not granted to adjudicate claimed reserved water rights.

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[34] There were a number of other matters pending before Congress which became the occasion for comment on S.18 and on the subject of the importance of State water rights. For example, Senator Knowland included the texts of S.18 and S. Rep. No. 755 thereon in comments he made on the Santa Margarita River litigation (98 Cong. Rec. 120-129 (1952)), a then bitter controversy arising out of a suit brought by the United States asserting water rights for the huge Marine Base near San Diego known as Camp Pendleton. See *U.S.* v. *Fallbrook Public Utility District*, 101 F. Supp. 298 (S.D. Cal. 1951). Other proceedings in this case are found at 108 F. Supp. 72 (1952), and 109 F. Supp. 28 (1952).

C. Section 208 of H.R. 7289, Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1953, 82d Cong., 2d Sess. (1952)

The provisions of Section 1 of S.18 (with one additional subsection) became law as Section 208 of H.R. 7289, providing appropriations for the Justice Department for fiscal year 1953.[35]

Section 208 as passed by the House barred the use of any funds for any suit by the Government against a State or against more than 2500 defendants, the latter provision of which was apparently expected to stop the Santa Margarita case [36] (98 Cong. Rec. 3555-3556). The Justice Department wrote Senator McCarran, as Chairman of the Senate Appropriations Committee unit which would hear the House bill, and asked that the Senate Committee "eliminate" Section 208.[37] Senators Knowland and Nixon also wrote to the Committee pointing to a number of instances in which they thought the House version would have too broad an effect but still urging language which would deny funds to continue the case in question ". . . until Congress can take action on legislation such as S.18 or H.R.5368. . . ." [38]

The Solicitor General of the United States was the chief spokesman for the Department at the Senate hearings. Senator McCarran, while stating his frank

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[35] Act of July 10, 1952, P.L. 495, 82d Cong., 2d Sess., 66 Stat. 560.

[36] See n. 34, *supra*.

[37] See Hearings on H.R. 7289 before the Subcommittee of the Senate Appropriations Committee, 82d Cong., 2d Sess. 1339 (1952).

[38] *Id.* 1345. Note at 1346-47 Colorado Senators Johnson and Milliken had also written to the Committee expressing concern as to the effect of the House version of Section 208 on then pending litigation in Colorado. See n. 40 *infra* on H.R. 5368.

opposition to the Government in the Santa Margarita case, nevertheless said that Section 208 as passed by the House was not the remedy.

The following colloquy then ensued:[39]

> Senator McCarran. Why is it your department is opposing my Senate bill 18, which to my mind runs along this very line? In other words, I am an owner of a water right on the Truckee River. It has a priority of 1860. In order for me to adjudicate my water rights, if I were to attempt to, if they were in doubt, I would have to bring, if the Government owned land on the Truckee River to which a water right applied, I would have to bring the Government in. I couldn't ever adjudicate my water right, because I have got to bring in all the water users of that system. That is all this S.18 does, to provide that the Government of the United States be brought into court to determine its water rights if, as, and when it has water rights on a certain system. I cannot figure out why you fellows are opposing it.
>
> Mr. Perlman. I do not know that it came to me. I have some recollection about a discussion as to whether the Department should agree that the United States should be made a defendant in controversies over water rights between States. . . .
>
> Senator McCarran. That is not my intention at all.
>
> Mr. Perlman. That is what I think is what motivates any opposition to it.

At a further Committee session held on June 23, 1952, Senator Knowland appeared on behalf of Senator Nixon and himself and urged the adoption of the substitute language they had proposed for Section 208.

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[39] *Id.* 1349-50.

In the course of his remarks, Senator Knowland referred to the Santa Margarita project bill H.R. 5368[40] and in discussing its general purposes observed:[41]

> . . . In addition, Mr. Chairman, section 4 imposes on the Federal Government the requirement of proceeding in conformity with the laws of the States with respect to the proper use or distribution of water and shall not interfere with or acquire any vested right except upon specific authorization and upon due compensation being paid therefor.
>
> I might point out, Mr. Chairman, that this provision is similar in theory to S.18, which was introduced by the chairman of this subcommittee.
>
> Mr. Chairman, if there is no objection, might I ask that H.R. 5368, a companion to S.2809 introduced by Senator Nixon and me, be introduced at this time in the record?
>
> SENATOR MCCARRAN. That will be done, and we will also insert S.18 in the record at this point.

S. 18 was thus again brought to the fore. After some further discussion, the McCarran-Knowland exchange of views ended with the following:[42]

> SENATOR MCCARRAN. I want to draw your attention, Senator Knowland, to the fact that the Senate on Saturday passed S. 18, and I am putting it in the side slips for the consideration of the committee. I was wondering if it would take the place of the amendment offered by the House, the substitute offered by you and Senator Nixon.

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[40] H.R. 5368 was a bill to settle the Santa Margarita River litigation controversy by providing a water supply project for the area. It included a Section 4 relating to complying with State law.

[41] See Hearings, *supra* n. 37, at 1802.

[42] *Id.* 1807.

> SENATOR KNOWLAND. I have not had a chance to examine the slight changes which were made in S. 18 in the Senate on Saturday, but I will have that explored to see whether that would be possible . . .

The Senate Committee's report [43] on the bill recommended that Sec. 208 as inserted on the House floor be deleted and:

> As a substitute . . . the Committee recommends that the following provision be included in the bill, this provision having passed the Senate on June 21, 1952, as a part of S.18.

There was then set forth all of Section 1 of S. 18, renumbered, however, as Section 208(a), (b), and (c) as ultimately adopted. On the same day, Senator McCarran separately announced on the Senate floor his intention to offer this as an amendment to H.R. 7289 and the text was printed in the Record (98 Cong. Rec. 7893). Two days later, when the bill came up for debate, the amendment, now known as the McCarran Amendment, was adopted. Senator Knowland concurrently brought up the language proposed by Senator Nixon and himself to deny funds for the Santa Margarita case. Senator McCarran said that this could be added to Sec. 208 as a new subsection (d) and that it could well go to a conference with the House. This was agreed to (98 Cong. Rec. 8109-8110), and the bill went to conference.[44]

In action in the House on the conference report, the full McCarran Amendment, including the Knowland

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[43] S. Rep. No. 1807, 82d Cong., 2d Sess. 10 (1952).

[44] There were two conference reports on H.R. 7289, H.R. Rep. No. 2454 and H.R. Rep. No. 2485. Both reported Sec. 208 as "in disagreement".

addition was read and debated (98 Cong. Rec. 9444-9447). While the bulk of the discussion concerned the Knowland addition, Congressman Rooney in opposing all of Section 208 read some comments from the Marine Corps as follows (98 Cong. Rec. 9445):

> Section (208) incorporates into the appropriation bill the language of S.18, which gives consent to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or (2) for the administration of such rights where the United States is an owner or contemplated owner. The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions. In such a situation the United States will be subjected to the probable loss of valuable water rights. The Department of Justice protested vigorously against the enactment of S.18, which now has been inserted in the appropriation bill where no such legislation belongs.

The foregoing reiteration of the clear understanding, by all concerned, of the essence of S. 18 leaves no room for doubt that Congress intended (1) all Federal rights must be asserted upon joinder of the United States in a State court, and (2) that part of a watershed could be adjudicated even though this resulted in "piecemeal adjudication". To make this even more definite, Congressman Rooney, after reading the following from the memorandum:

> . . . It is unthinkable that Congress should in an appropriation bill pass substantive legislation making the United States defend itself in all manner of suits over water rights, and, at the same time,

> preventing the United States from obtaining an adjudication by the courts of its own rights in such a vitally important matter.

then said:

> Under the language of section 208, you would have to have an assistant attorney general defending the United States Government in every one of the State courts of the State of California and other Western States, and the cost therefor[e] added to the payroll of the Department of Justice merely to defend valuable water rights of the Federal Government would be enormous. This is about as spendthrift a proposition as I have seen in a long time.

With the issues thus in sharp focus the vote came on Mr. Rooney's motion to concur in the Senate action of changing the House version of Section 208, but to then strike the entire Senate amendment. This motion lost on a roll call vote 181-119 (98 Cong. Rec. 9446), and the House then receded and concurred in the Senate amendment. The date was July 4, 1952. The President signed the bill into law on July 10. This was almost precisely three years from the date on which Senator McCarran first introduced his proposition in the Senate in the form of S. 2305.

It is manifest from the foregoing legislative history that the Congress had long and arduously considered the effect of adopting the McCarran Amendment and was determined to act so as to subject the United States, when a necessary party, and every right it owned or claimed in water, to State proceedings for the adjudication of water rights.

II. UPON THE RESOLUTION OF THE QUESTION OF JURISDICTION, WHICH IS ALL THAT WAS DECIDED IN BOTH COURTS BELOW, MANY UNRESOLVED ISSUES REMAIN FOR TRIAL AND DETERMINATION BEFORE CLAIMS UNDER THE RESERVATION DOCTRINE WILL BE RIPE FOR REVIEW IN AN APPELLATE COURT OR BEFORE IT MAY PROPERLY BE ASSERTED THAT STATE PROCEEDINGS "ELIMINATE" (BRIEF 20) SUCH RIGHTS.

The Government's request that this Court "reaffirm the principle [of] reserved water rights" (Brief 20) prior to a presentation of specific claims is premature, unnecessary to a decision of this cause, and presents a question not before the Court on certiorari.

The question raised by the United States in seeking certiorari was whether the respondent court had jurisdiction—a distinct and sharply focused issue—not that the existence of reserved rights throughout the West must be reaffirmed. The latter raises an issue going far beyond the scope of the arguments heard in the court below and which was not presented in the petition for a writ of certiorari filed by the United States. Indeed, on page 6 of its petition, the Government stated that ". . . the [Colorado] court did not expressly decide that the United States has no reserved water rights in Colorado . . .". The Supreme Court of Colorado did in fact state (A. 37):

> We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.

The issue which *is* in contention here is the scope of the waiver of sovereign immunity under 43 U.S.C.

666. As the Government stated in its petition for a writ of certiorari (p. 7), this issue of jurisdiction was clearly "separable from the merits", and had the finality (since not subject to further review in the State courts) requisite to this Court's jurisdiction under 28 U.S.C. 1257.[45] All other issues in the case, including the extent of reserved rights, are still unresolved below. They are thus not only lacking in the finality necessary for a proper review here, but are plainly premature for consideration.[46]

The United States itself said, in seeking certiorari, that the reach of consent to suit under Section 666 "has never been definitively construed by this Court" and that it was important that this be done (Petition 11). We concurred[47] and suggest that once this has been done State courts will be fully equipped to pass on whatever specific claims may be advanced whether based on appropriation, purchase, reservation, or

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[45] *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916). Like the instant case, *Mt. Vernon* involved the denial by a state supreme court of a petition for writ of prohibition to prevent a state court from taking jurisdiction on the ground that to do so would violate Federal law. Mr. Justice Holmes disposed of an argument that the state supreme court's denial of the petition was not a final judgment saying: "Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment . . . the fact that it does not decide the merits . . . is immaterial. It is not devoted to that point, *but only to the preliminary question of the jurisdiction of the court* in which that suit is brought." *Id.* at 31. (emphasis added).

[46] It appears to us that this attempt to raise other issues clearly transgresses this Court's Rule 40 (1) (d) (2) concerning the raising of additional questions. See *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964).

[47] Respondents' Brief in Support of Certiorari, p. 1.

otherwise. We accordingly urge that the Court decline the invitation to expand into determinations on the merits until specific claims have been presented and rulings made.

It is not enough to say that the court below has "strongly suggested" (Brief 4) that the United States does not have reserved rights or that it has made statements "casting doubt" (Brief 20) on their existence. Who will know what those claims are until they are specifically asserted as the court below suggests they be? An interpretation of 43 U.S.C. 666 which would require the United States to demonstrate its claims for water rights under the reservation doctrine would be the best means whereby the Government's contentions could find expression in a properly justiciable controversy.[48]

The Government plainly misconstrues the court below in charging that the cases cited by the United States in support of its claimed reserved rights—*Arizona* v. *California*, 373 U.S. 546; *Winters* v. *United States*, 207 U.S. 564; *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission* v. *Oregon*, 349 U.S. 435—were held as not "determinative" as a consequence of the Colorado Constitution and *Stockman* v. *Leddy*, 55 Colo. 24 (Brief 4-5). What the court *did* say was that *Stockman* was the

[48] The Government's admission (Brief 19-20) that ". . . the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West", shows that the requisite "Case or Controversy" as required by Article 3 Section 2 clause 1 of the Constitution is lacking here. We do not have a situation admitting of specific relief through a decree of conclusive character within the meaning of *Aetna Life Ins. Co. of Hartford, Conn.* v. *Haworth*, 300 U.S. 227 (1937).

only *Colorado* case it had found that was "determinative" against the assertion that the United States did have reserved water rights and that it would postpone consideration of whether *Stockman* is to be overruled until after the United States presented its specific claims and the issues of fact and law were clearly drawn (A. 37).[49] A court which had only been asked to decide jurisdiction could hardly speak otherwise because the decision on jurisdiction contemplated—as the United States recognized in seeking certiorari—that the United States would be participating "in the ongoing proceeding in the State district court." (Petition 7)

The United States should go back to that court for a determination of all of its claims before it comes here expressing concern that "State courts and State law together would, in fact, eliminate such rights" (Brief 20). At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, and then quantified to bring certainty in water use. This Court found in *Arizona* v. *California*, 373 U.S. 546, that the reserved rights claimed

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[49] As noted in the opinion below, the Government had urged the reservation doctrine as a bar to adjudication and the Central Colorado Water Conservancy District, a party here, had urged the Colorado constitution and *Stockman* v. *Leddy*, 54 Colo. 24 (190) in support of its opposition to the Government's argument. It certainly was appropriate for the court to review the contentions of counsel but the fact remains that a determination on the merits has yet to be made in the Colorado courts. (A. 34-37). As the court below stated: ". . . we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound." (A. 37).

for Indian Reservations had to be implied (at 599), as had been the case in *Winters* v. *United States*. The Special Master in *Arizona* v. *California* had found ". . . the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation".[50] He thus took a great amount of evidence concerning these Reservations, including their population, economy, acreage and water requirements and then quantified the water rights for five Reservations on the mainstream of the Colorado River, rejecting the possibility of an open-end decree,[51] in order to "establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." This Court specifically approved the Master's findings that a reservation of water had been intended for each of the five Indian Reservations involved, agreed with his conclusion as to the quantity of water intended to be reserved, and found the various irrigable acreages included by the Master in reaching quantities of water to be reasonable.[52] This specificity in treating with conflicting claims in this vital area of water rights is in our view the great contribution of the adjudicatory process, and was what Congress intended

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[50] *Arizona* v. *California*, No. 8 Original, Oct. Term, 1962, Report of Special Master Simon H. Rifkind, Dec. 5, 1960, at 259.

[51] "[which would] simply [state] that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment." *Id.* 263-264.

[52] 373 U.S. at 600, 601.

in consenting to the joinder of the United States in State proceedings for the consideration of all claims.[53]

The necessity for doing away with the uncertainty engendered by the implied reservation doctrine is strongly urged in the recent Public Land Law Review Commission Report.[54] That Report also details problems arising out of the reservation concept, most if not all of which require some evidentiary proceeding before a determination could be made.[55] These unresolved issues in connection with reservations provide additional reasons why we urge this Court to decline the Government's invitation to generalize now on the reservation principle.

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[53] This Court in *Arizona* v. *California* approved the fact that the Master declined to adjudicate claims by the United States for other Indian Reservations and federal establishments, particularly those relating to tributaries (*Id.* 595). The Master found it inappropriate to adjudicate matters of intrastate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act "regulation of the use of tributary water" was left to the states (*Id.* 588). The Master did adjudicate conflicting claims of the States and of the Government on the Gila River because this was an interstate tributary on which the controversy was immediate and requiring of decision. But even here he declined to approve a claim on behalf of an Indian Reservation located in Arizona against (1) users of water in New Mexico because the evidence showed it to be impractical, as well as against (2) users of water in Arizona because this was a matter of "intrastate rights and priorities". (Report 333-334). These few references show the desirability of an adjudication and a record before reaching conclusions as to the extent of any claims to the use of water.

[54] *One Third of the Nation's Land*, A Report to the President and the Congress by the Public Land Law Review Commission, June 1970.

[55] *Id.* 144.

To dispose of the uncertainty and other problems in the reservation doctrine the Commission suggests legislation to:

1. Provide a reasonable time for Federal agencies to give public notice of water needs for reserved areas and forbid assertion of reserved claims not so published.
2. Establish procedures for administrative or judicial determination of the reasonableness of the quantity claimed, or the validity of the proposed use under present law.
3. Provide that express reservations of water be made in connection with any future reservations of land, and
4. Require that compensation be paid where application of the implied reservation doctrine interferes with uses vested prior to the *Arizona* v. *California* decision in 1963.

While these are worthwhile objectives, as is clear from the legislative history of 43 U.S.C. 666, Congress has already declined to provide the "catalog", which 1 would provide, presumably because it thought that consent to suit would reach the same end. As far as 2 is concerned, in passing Section 666 Congress provided that established State adjudicatory procedures should handle questions such as the "reasonableness of the quantity claimed under the reservation doctrine, its priority date, and the purpose for which the reserved water may be used".[56] These were precisely the matters the Master decided in *Arizona* v. *California* to provide certainty on the river, just as can be done in State adjudications.

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[56] The Report at 148-149 notes that these matters should be subject to judicial review, presumably when first decided in some administrative, rather than judicial proceeding.

As far as items 3 and 4 above are concerned, the past has shown it would indeed promote certainty in water rights for Congress to make specific provision for them in withdrawing or reserving lands so that such rights would no longer have to be implied. Also, if Congress wishes to provide compensation for any vested rights taken subsequent to *Arizona* v. *California,* this is certainly within its power. However, these suggestions go beyond the questions here.

The statement in the Commission Report that "The McCarran Act [sic] . . . is an unsatisfactory vehicle for obtaining definition of Federal reservation claims" [57] is quite understandable in that adjudications thereunder will certainly not define *all* the Federal reservation claims within "the reasonable period of time" in which the Commission wants agencies to publish their projected water requirements. However, an adjudication under Section 666 will certainly produce the quantification which the Commission wants on those "river systems or other source[s]" of water where, as here, the local water users join the Government in order that the rights of all may be fixed and determined, and where it appears that the Government is a necessary party in order to reach these results. Local water users are entitled to such certainty now and this is precisely what Congress intended in enacting the McCarran Amendment. Regardless of the improvements which any study may suggest in these procedures, the Government should delay no longer in putting its claims before the courts so that a start toward the certainty that the Public Land Law Review Commission finds essential—as this Court did in *Arizona* v. *California*—may be had.

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[57] *Id.* 148.

III. THE PROCEEDING IN THE RESPONDENT COURT WAS A GENERAL ADJUDICATION OF WATER RIGHTS FROM A RIVER SYSTEM OR OTHER SOURCE WITHIN 43 U.S.C. 666.

The Government contends that the proceeding in the respondent court was not a "general" adjudication, and thus not within 43 U.S.C. 666, because it "does not embrace an entire river system"[58] (Brief 7) and all parties claiming water rights were not before the court.

In discussing whether there is a river system in this case, the Government concedes that the cases are not dispositive (Brief 27), but contends:

> . . . it *seems apparent from the legislative history* that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. (Brief 27, emphasis added).[59]

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[58] Ignoring entirely the actual language of the statute: "for the adjudication of rights to the use of water *of a river system or other source*". Also, as the Court below observed, the word "entire" is not in the statute. (A. 29).

[59] The Government continues with its complaint about "piecemeal adjudications" and suggests that (1) where a river system is wholly contained within one state (as here) the "proceeding should at least relate to the entire system"; and (2) where a river system traverses the boundaries of a single State "the United States should not . . . be required to assert its rights in any proceeding that is less than statewide in character." (Brief 28). While the foregoing is unclear to us it nevertheless seems to be inconsistent with what the Government told the court below in seeking prohibition: ". . . while it may not be necessary to conclude that all users of the Colorado System in Colorado must be joined we believe all users outside a Water District that would be substantially affected by diversions in a Water District are necessary parties to a proper general adjudication under 43 U.S.C. Sec. 666." (Record 30, 62.)

We submit that the legislative history demonstrates precisely the opposite. Congress was well informed as to the possibility of numerous suits and nonetheless found the legislation meritorious. This possibility was specifically raised by the Bureau of the Budget and pointed out on several occasions by both the Departments of Justice and Interior. The objections were noted by the Committee when passage was recommended.[60] At the very moment of final consideration Congressman Rooney counselled against passage because of this very point. The subsequent vote resoundingly rejected such objection.[61]

Nevertheless, the Government says that "even if an entire river system is in fact involved"[62] we do not have a general adjudication because the necessary parties were not before the court at the time of the attempted joinder. The Colorado Supreme Court found no difficulty in holding this to be a general adjudication within the meaning of *Dugan* v. *Rank*, 372 U.S. 609, 618, because proceedings such as involved in this case met the tests therein prescribed, *i.e.*, this is a public, not a private suit; all claimants are parties; relief is granted as between claimants; and priorities are established. Under Colorado law the adjudication proceedings are "general" whether an original action within a water district or one supplementary thereto. Such actions are in the nature of *in rem* proceedings, and, in

[60] S. Rep. No. 755, 82d Cong., 1st Sess. 2 (1951), quoted at 17 *supra*.

[61] 98 Cong. Rec. 9445 (1952); see pp. 28-29 *supra*.

[62] Brief 30. Though strenuously argued below, the Government's point on the alleged lack of "an entire river system" seems now to have merged with their alleged lack of necessary parties, and indeed to have been submerged by that claim.

the instant case, all statutory notice requirements were complied with.[63] Upon such compliance the court acquired jurisdiction of all persons using or claiming the right to use waters of the Eagle River and its tributaries.

The Government now urges that since it would, if otherwise properly a party, claim rights antedating in priority the rights of others already in decree, the owners of those rights are necessary parties before the United States can properly be joined. The Government asserts this despite the fact it has not actually filed such claims, without which the need for and the identity of such parties cannot be determined. Furthermore, this assertion is made despite the fact the court below said appropriate notice could be given upon the filing of such claims.[64] Additional parties are

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[63] Colo. Rev. Stat. 148-9-7, as amended (1963), reads in part as follows:

> A supplemental adjudication shall be initiated in the same manner as provided in this article for the initiation of original adjudications except that the petition for a supplemental adjudication shall contain a proper averment referring to the original adjudication . . . The notice shall be given and served in the same manner as in the case of an original adjudication.

Notice in original suits is provided for in Colo. Rev. Stat. 148-9-5, as amended (1963). Service is required to be made by mail on all persons (named in a list certified by the irrigation division engineer) who diverted water in the District in the preceding calendar year as well as on all persons having filed maps and statements in the office of the State Engineer. Additionally, publication of the notice is made for four weeks (five insertions) in one public newspaper in each county into which the water district extends. All water users are thus advised of the pendency of the proceedings and of their right to appear and object to any claim therein made.

[64] A. 43. In addition, Colo. R. Civ. P. R. 19(a), as amended (1963), requires joinder of all persons in the situation so presented.

necessitated, if at all, not by joinder of the United States but by the claim or claims it makes.

The purpose of Section 666 was to authorize the joinder of the United States as one of the parties defendant in a proceeding such as involved in this case. When service was accomplished as provided in Section 666 the joinder was complete,[65] and for the first time a truly general adjudication of rights to the use of water of the Eagle River and its tributaries was made possible.

CONCLUSION

The respondent court and the court below found this proceeding, instituted in 1967, to be one "for the adjudication of rights to the use of water of a river system or other source" to which the Congress had given consent to join the United States. The ruling below that jurisdiction had been properly obtained over *all* of the claims of the United States is overwhelmingly supported by the legislative history, developed over three years of consideration of the subject by the Congress. The need for certainty in waters rights adjudications, totally lacking where the United States if a necessary party is not in the proceeding, was intended to be accomplished by the action the Congress took. This is all that has been decided below, and we urge that this decision be affirmed to the end that the Congres-

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[65] No objection was ever entered to the method in which joinder was accomplished.

sional purpose of bringing certainty and stability in this field may be fulfilled.

Respectfully submitted,

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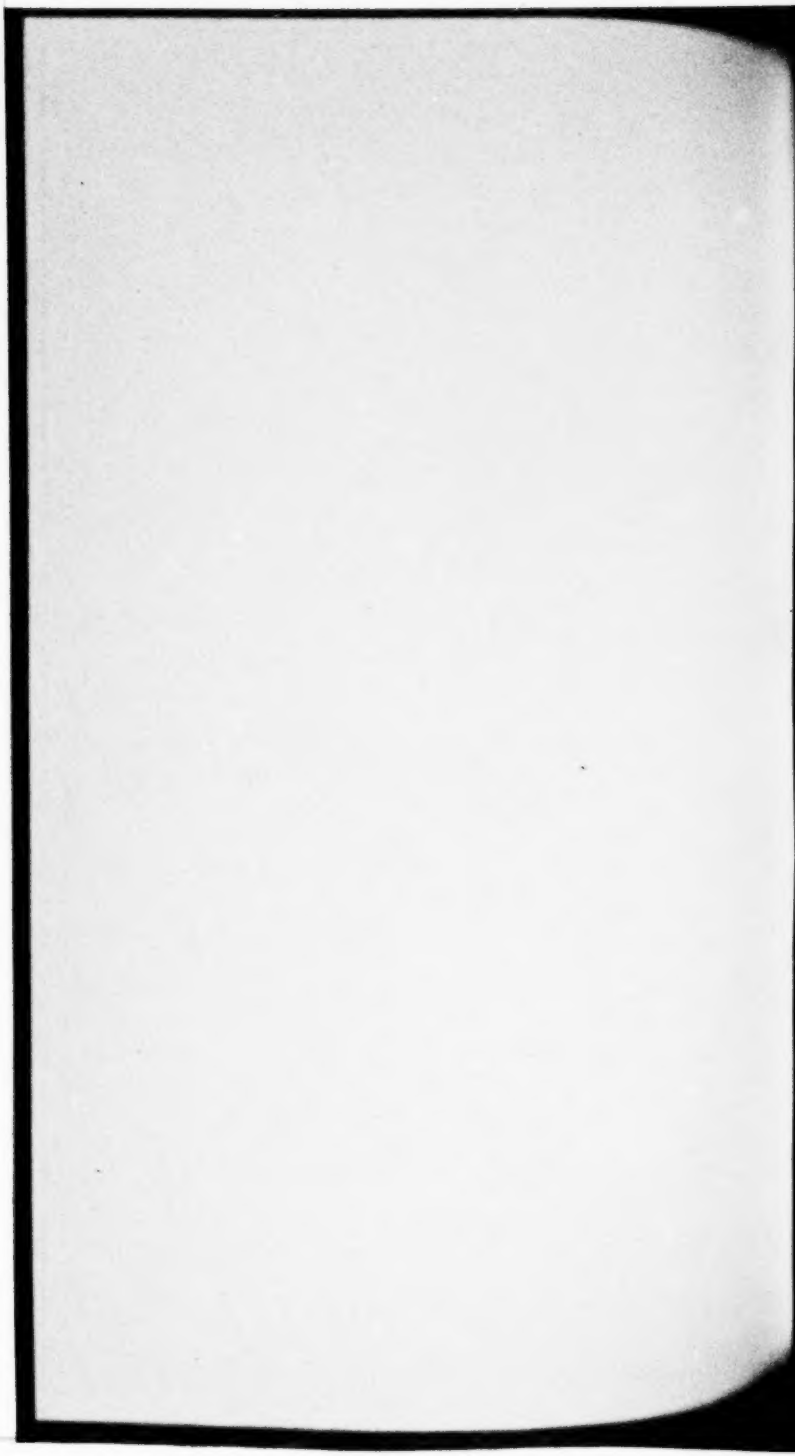
July 15, 1970



81ST CONGRESS
1ST SESSION

S. 2305

IN THE SENATE OF THE UNITED STATES

JULY 21 (legislative day, JUNE 2), 1949

Mr. MCCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: *Provided,* That the United States shall have the right of removal to the Federal court

of any such suit in which it is a party: *Provided further*, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

81st CONGRESS
1st SESSION

S. 2305

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

By Mr. McCARRAN

JULY 21 (legislative day, JUNE 2), 1949
Read twice and referred to the Committee on the Judiciary

EXHIBIT 2

82d CONGRESS
1st SESSION

S. 18

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 1951

Mr. McCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: *Provided,* That the United States shall have the right of removal to the Federal court

of any such suit in which it is a party: *Provided further*, That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

82D CONGRESS
1ST SESSION

S. 18

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

By Mr. McCARRAN

JANUARY 8, 1951

Read twice and referred to the Committee on the Judiciary

EXHIBIT 3

Calendar No. 711

82D CONGRESS
1ST SESSION

S. 18

[Report No. 755]

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 1951

Mr. MCCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951

Reported by Mr. MCCARRAN, with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit: ~~*Provided,* That the United States shall have the right of removal to the Federal court~~

~~of any such suit in which it is a party:~~ ~~*Provided further,*~~ *Provided, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided,* That no judgment for costs shall be entered against the United States in any such suit. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

SEC. 2. The head of every department or agency of the United States and of every corporation which is wholly owned by the United States shall, within two years from the effective date of this Act, cause to be filed with the Secretary of the Interior, in such form and detail as he shall prescribe, a complete list of all claims of right to the use by that department, agency, or corporation of the waters of any stream or

other body of surface water in the United States for agricultural, silvicultural, horticultural, stock-water, municipal, domestic, industrial, mining, or military purposes, or the protection, cultivation, and propagation of fish and wildlife, or any other purpose involving a consumptive use of water, or for the production of hydroelectric or other power or energy. Said list shall be supplemented and revised promptly as new claims of right are made and existing claims are abandoned or otherwise disposed of. A catalog of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of the claimant department, agency, or corporation to be of such importance to the national defense as to require secrecy, shall be open to inspection by the public and, subject to the same exception, copies thereof and of items therein shall be furnished by the Secretary upon payment of the cost thereof. The Secretary may make rules and regulations to carry out the purpose of this section.

Calendar No. 711

82D CONGRESS
1ST SESSION

S. 18

[Report No. 755]

A BILL

To authorize suits against the United States to adjudicate and administer water rights.

By Mr. McCARRAN

JANUARY 8, 1951
Read twice and referred to the Committee on the Judiciary

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951
Reported with amendments

8e

EXHIBIT 4

Calendar No. 711

82d Congress, 2d Session | SENATE | Rept. 755, Part 2

AUTHORIZING SUITS AGAINST THE UNITED STATES TO ADJUDICATE AND ADMINISTER WATER RIGHTS

April 2, 1952.—Ordered to be printed

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany an amendment to S. 18 as reported]

Strike out section 1 as proposed to be amended beginning on page 1, line 3 down to and including line 18 on page 2 and insert in lieu thereof the following:

"That consent is hereby given to join the United States as a defendant in any suit, (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

PURPOSE

The purpose of the proposed amendment is to clarify the first committee amendment to S. 18 as reported by the Committee on the Judiciary on September 17, 1951.

STATEMENT

It has come to the attention of the committee that there is a possible ambiguity in the language of section 1 of S. 18 as reported by the committee. The ambiguity consists in the following: The first sentence of the first proviso of section 1 is as follows:

> *Provided*, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

The second sentence of said first proviso is as follows:

> When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

It has been stated that the second sentence of the proviso may refer back to the first sentence and be restricted to suits of that category rather than to the first part of the section which authorizes the joining of the United States as a defendant in any suit as to the adjudication of rights to the water. While the committee does not believe that such is the case, in order to make the matter extremely clear the above amendment is offered.

It has been noted that the amendment to section 1 is in somewhat different form than section 1 appears at the present time, but it was felt that in order to convey a clearer meaning the form now submitted is better. The committee believes and is of the opinion that this amendment does not in any way change the effect of section 1 as reported but simply rearranges the language thereof so as to make the intent thereof clear and unmistakable.

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EXHIBIT 5

82D CONGRESS
1ST SESSION

H. R. 5735

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1951

Mr. ENGLE introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

Title amended: See House Report No. 1452, 2/29/52

A BILL

To require all Federal officers in carrying out laws relating to water-resources development and utilization to comply with the laws of the affected States or Territories.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all Federal officers in carrying out the laws relating to water-resources development and utilization, including the furnishing of water to national-defense installations, in States or Territories, lying wholly or partly west of the ninety-eighth meridian, shall proceed in conformity with the laws of such States or Territories with regard to the control, appropriation, use, or distribution of water and shall not interfere with or acquire any vested right except upon specific

authorization and upon due compensation being paid therefor. The provisions of this Act shall not be construed as affecting or intended to affect in any manner whatsoever the provisions of section 8, Reclamation Act, 1902.

82D CONGRESS
1ST SESSION

H. R. 5735

A BILL

To require all Federal officers in carrying out laws relating to water-resources development and utilization to comply with the laws of the affected States or Territories.

By Mr. ENGLE

OCTOBER 16, 1951
Referred to the Committee on Interior and Insular Affairs

EXHIBIT 6

82D CONGRESS
2D SESSION

H. R. 7691

IN THE HOUSE OF REPRESENTATIVES

MAY 1, 1952

Mr. BUDGE introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

A BILL

To require Federal officers, agencies, and employees to act in accordance with and submit to the laws of the several States relative to the control, appropriation, use, and distribution of water and providing that the United States shall sue and be sued in the courts of such States in litigation arising therefrom.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all Federal officers, agencies, and employees in carrying out Federal law relating to water-resources development and utilization, including but not limited to the delivery of water to national defense installations, and to federally owned areas for other purposes, shall act in accordance with the same

procedures as provided by the laws of the several States for the control, appropriation, use, and distribution of water by private persons, and no other procedure shall be hereafter instituted or continued. Federal officers, agencies, or employees in developing or acquiring water or water rights pursuant to Federal law shall not interfere with any right recognized by local custom or law except when authorized to do so and upon payment of just compensation therefor: *Provided*, Federal officers, agencies, or employees may acquire such rights by gift, exchange, or donation. The provision of this Act shall not be construed as repealing or affecting any of the provisions of section 8, Reclamation Act, 1902, but shall be construed as being supplementary thereto.

SEC. 2. All Federal officers, agencies, and employees are authorized and directed to submit to the jurisdiction of the appropriate judicial and administrative agencies and tribunals of the several States in matters concerning the acquisition, determination, and exercise of rights to the use of water or the administration of such rights.

SEC. 3. The United States shall sue and be sued in the State courts in all matters pertaining to the acquisition, determination or exercise of rights to the diversion and use of water, and such suits shall not be removed to a Federal court upon petition of the United States. In such suit no judgment for costs shall be entered against the United States

Process in such suit may be served on the Attorney General of the United States or on the United States district attorney for the district which embraces the area of jurisdiction out of which the process issues.

SEC. 4. The procedures herein provided for shall apply to proceedings for the acquisition, adjudication, abandonment, change of point of diversion, and change of place of use of water rights.

SEC. 5. Nothing in this Act authorizes or shall be construed as authorizing the joinder of the United States in any suit or controversy in the United States Supreme Court between two or more States involving the rights of a State to the use of water of any interstate stream.